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No. 06-899

IN THE
# Supreme Court of the United States

FISHING VESSEL CHLOE Z,
*Petitioner*,

v.

ROBERT MATOS AND SLOBODAN PRANJIC,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

MICHAEL A. BARCOTT
HOLMES WEDDLE & BARCOTT
999 Third Avenue
Suite 2600
Seattle, Washington 98104
(206) 292-8008

DAVID C. FREDERICK
*Counsel of Record*
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7951

*Counsel for Petitioner*

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The dispositive facts and law in this case are not disputed: (1) maritime personal-injury claims must be filed within three years of the injury; (2) respondents were injured in 1991 and 1992, while working aboard petitioner Fishing Vessel CHLOE Z; and (3) respondents filed their claims against the CHLOE Z *in this case* in 1996, more than three years after their injuries. Because respondents filed their claims in this case more than three years after those claims arose, the statute of limitations bars the claims. Nevertheless, a divided panel of the Ninth Circuit permitted respondents to bring their claims in this case. In refusing to enforce the statute of limitations, the court relied on the fact that, in 1994, respondents had filed timely claims against the CHLOE Z in *different* cases. *See* Pet. App. 2a-3a. But, as four other courts of appeals have held, the filing of a timely maritime personal-injury claim against a defendant in one case does not toll the running of the statute of limitations for purposes of a *separate, untimely suit* against that defendant.

Respondents claim that none of this matters because (in their view) the Ninth Circuit held that the claims in their original 1994 suits against the CHLOE Z remained pending in 1996. Even if that were true, it is irrelevant. It does not change the fact that the Ninth Circuit held that the filing of a timely claim *in one case* prevents the normal operation of the statute of limitations *in another case*. And that conclusion conflicts with the holdings of other circuits, which have properly enforced the statute of limitations to bar untimely claims even when the plaintiff had filed a timely claim in a different case.

Respondents muster no defense of the Ninth Circuit's decision on the merits. Instead, they offer a purported alternative ground for sustaining the court of appeals' judgment, but it is insubstantial. They claim that the Ninth Circuit could reach the same result on remand by reversing the district court's denial of respondents' motions to consolidate their 1994 cases with this case. The consolidation issue is not an alternative ground for affirmance, however, because respondents forfeited any objec-

tion to the denial of their motion to consolidate by failing to raise the issue in an earlier appeal in this case. Respondents also suggest that their failure to comply with the statute of limitations does not matter because the CHLOE Z's owner received notice of their claims within the limitations period. But, even if that were a reason to ignore the statute of limitations, respondents' pursuit of claims against the owner of the CHLOE Z provided no notice to other parties with claims on the vessel (including those with claims superior to the owner's).

This Court should grant review to resolve the circuit conflict created by the Ninth Circuit's decision and to restore the uniformity that Congress intended when it enacted the statute of limitations for maritime personal-injury actions. In addition, the Court should act to provide needed predictability for the maritime insurance industry and to prevent the forum shopping that the Ninth Circuit's rule encourages.

## ARGUMENT

### A. The Brief In Opposition Is Based On An Irrelevant Premise

1. Respondents premise their entire brief in opposition on the erroneous assertion that their timely filed claims against the CHLOE Z in their original 1994 suits remained pending until ruled on in the separate 1996 action from which this petition arises. That contention makes no sense. The key fact, which respondents seek to obscure, is that their original 1994 suits were *completely separate cases* from this case, which is a mortgage-foreclosure action brought in 1996 by a mortgagor unrelated to respondents. Even if the claims that respondents filed against the CHLOE Z in their 1994 suits somehow remained pending *in those cases* after the cases went to final judgment, those timely claims did not magically become a part of *this case*. Respondents became parties to *this case* because they successfully *intervened* and filed claims against the CHLOE Z in this action brought by a mortgagor (which is not a party here). They did so over the

CHLOE Z's objection that the three-year statute of limitations precluded respondents from asserting new claims in this case – an objection that the district court accepted in the decision from which this petition arises (after the Ninth Circuit reversed the district court's initial holding that the CHLOE Z was equitably estopped from asserting the statute of limitations). *See* Pet. App. 7a n.1, 9a, 15a. Thus, whether respondents had (or have) timely claims pending against the CHLOE Z in some other case is irrelevant. They filed the claims *in this case* more than three years after their injuries, and the statute of limitations therefore bars the claims, as the district court correctly held. *See id.* at 15a.

Because respondents' timely 1994 claims against the CHLOE Z were filed in a different case, it is irrelevant whether the Ninth Circuit believed that those claims were still "pending" when respondents sought to intervene in this case. The important point is that the Ninth Circuit relied on the filing of those claims in concluding that the statute of limitations was met here.[1] Therefore, the Ninth Circuit held, in conflict with the decisions of four other courts of appeals, that the timely filing of a claim in one case tolls the statute of limitations for purposes of a second, untimely suit. Respondents accordingly are mistaken in claiming that the question addressed in the petition is not squarely presented in this case.

**2.** In any event, respondents are incorrect in asserting that their 1994 *in rem* claims against the CHLOE Z remained pending after final judgments were entered in those cases. Respondents' course of conduct during those proceedings makes crystal clear that they abandoned those claims. *First*, although they pleaded *in rem* claims against the CHLOE Z, they made no attempt to cause the vessel's arrest. *See* Pet. App. 8a & n.4, 12a-13a; *cf.* Fed. R. Civ. P. Supp. R. C(3)(a)(ii)(A), (b)(i) (requiring issuance

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[1] *See* Pet. App. 2a ("The two plaintiffs filed both their *in personam* actions and their actions *in rem* against the vessel on May 11, 1994. The date was well within the three-year period.").

and service of arrest warrant upon filing of complaint). *Second*, the pretrial orders in those cases, which were issued under Federal Rule of Civil Procedure 16, made clear that the only claims to be tried were the *in personam* claims against Chloe Z Fishing Company and two other corporations. *See* Pet. App. 17a, 25a. Under well-settled law, therefore, respondents forfeited their *in rem* claims by allowing them to be omitted from the pretrial orders (regardless of whether the orders constituted a formal dismissal of those claims).[2] *Third*, throughout the trials in the 1994 cases, respondents pressed only their *in personam* claims and never attempted to pursue the *in rem* claims. *See id.* at 12a-15a. *Fourth*, the district court entered final judgments in those cases, *see id.* at 33a-36a, and those judgments were affirmed on appeal,[3] with no party indicating that those final judgments had not resolved all claims against all parties.[4] Thus, when the dis-

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[2] *See, e.g., Gregory v. Shelby County*, 220 F.3d 433, 442-43 (6th Cir. 2000) (claim pleaded in complaint but omitted from pretrial order was "waived"); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 843-44 (11th Cir. 1991) (affirming district court's denial of injunctive relief that was requested in complaint but omitted from pretrial order); *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982) (pretrial order's "purpose is to determine which of the claims pleaded will actually be tried" and, "[i]f a claim or issue is omitted from the [pretrial] order, it is waived"); *Price v. Inland Oil Co.*, 646 F.2d 90, 94-96 (3d Cir. 1981) (trial judge abused discretion in letting negligence claim go to jury where claim had been omitted from pretrial memorandum, even though no pretrial order was filed); *Katt v. City of New York*, 151 F. Supp. 2d 313, 346 (S.D.N.Y. 2001) (applying "established procedural principle that a party's failure to include a legal theory or defense in the pre-trial order results in its subsequent abandonment or waiver") (internal quotation marks omitted), *aff'd in part sub nom. Krohn v. New York City Police Dep't*, 60 F. App'x 357 (2d Cir. 2003); Fed. R. Civ. P. 16(e) (pretrial order "shall control the subsequent course of the action unless modified . . . to prevent manifest injustice").

[3] *See Pranjic v. Chloe Z Fishing Co.*, No. 96-17279, 1997 WL 697384 (9th Cir. Nov. 6, 1997) (judgment noted at 129 F.3d 127 (table)); *Matos v. Chloe Z Fishing Co.*, No. 96-17278, 1997 WL 702919 (9th Cir. Nov. 7, 1997) (judgment noted at 129 F.3d 126 (table)).

[4] Contrary to respondents' suggestion (at 10), their 1994 claims against the CHLOE Z did not remain pending while the judgments

trict court denied respondents' October 1996 motions to consolidate the 1994 suits with this case, it correctly held that respondents' 1994 actions were "over" upon entry of the final judgments. *Id.* at 39a, 46a. By the time the district court entered its final judgments in those cases, respondents' *in rem* claims against the CHLOE Z had been abandoned.[5]

Nothing in the district court's March 1997 order casts doubt on that conclusion. That order denied the CHLOE Z's motion for reconsideration of the court's conclusion that equitable estoppel precluded the vessel from asserting the statute of limitations to bar respondents' untimely intervention in this case. *See* Resp. App. 4a-5a. In so doing, the court rejected the CHLOE Z's argument that respondents could not bring claims *in rem* in this case because those claims lapsed when the vessel was not arrested in the prior cases. *See id.* at 7a. The court did not state that the claims against the CHLOE Z remained pending in the 1994 cases, and such a statement would have made little sense in light of the court's prior recognition that the 1994 cases were "over." Pet. App. 39a, 46a. (In any event, the pendency of timely claims in *the 1994 cases* would not have rendered timely respondents' untimely intervention in *this case*.)

Further, petitioner did not state either in its brief or at oral argument in the Ninth Circuit that respondents' *in*

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against Fishing Company were on appeal. Instead, the forfeiture of those claims was complete when the district court entered final judgments in those cases. *See, e.g., Flannery*, 676 F.2d at 129-31 (affirming district court's denial of post-trial motion raising claim that had been pleaded in the complaint but omitted from the pretrial order and not pursued at trial); *see also Union Planters Nat'l Bank of Memphis v. Commercial Credit Bus. Loans, Inc.*, 651 F.2d 1174, 1185-88 (6th Cir. 1981) (plaintiff may not assert a claim on appeal that was neither raised at trial nor mentioned in the pretrial order).

[5] *See* Pet. App. 3a, 6a (Reed, J., dissenting) (recognizing that respondents "abandoned [their] 1994 *in rem* action[s] against the Chloe Z" because they "fail[ed] to produce evidence and argument regarding their *in rem* claims during the 1996 trial[s]").

*rem* claims remained pending *after* the district court entered final judgments in the 1994 cases. Rather, petitioner noted that respondents' failure to pursue their claims against the CHLOE Z was inexcusable (and thus the application of equitable estoppel was unjustified) because, in July 1996, before the trials in the 1994 cases began, respondents knew of Fishing Company's financial difficulties. *See id.* at 12a-13a (district court recognizing same fact). Had respondents sought leave to pursue their claims against the CHLOE Z at that time, the district court likely would have granted respondents relief from their defaults. *See* Fed. R. Civ. P. 16(e) (allowing amendments to pretrial orders "to prevent manifest injustice"). But it is undisputed (and indisputable in light of the district court's factual findings) that respondents made no effort to pursue their claims against the CHLOE Z in the 1994 cases. *See* Pet. App. 8a & n.4, 12a-13a. Respondents therefore abandoned those claims.

### B. The Ninth Circuit's Decision Conflicts With Decisions Of Four Other Circuits

Stripped of respondents' gloss, the Ninth Circuit's holding is clear: it decided that the filing of a timely maritime tort claim against a defendant in one case tolls the running of the statute of limitations for the purposes of a *separate*, untimely action against that defendant. *See* Pet. App. 2a-3a. That conclusion conflicts with the decisions of the First, Third, Fifth, and Eighth Circuits interpreting the statute of limitations for maritime personal-injury actions and the substantively identical statute of limitations that applies to Jones Act claims.[6] Those courts all have held that an untimely suit is not made timely by the plaintiff's filing of a prior, timely suit. *See* Pet. 11-14.

In their brief discussion of the conflicting authorities (at 6-8), respondents offer a single purported distinction be-

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[6] *Mamer v. Apex R.E. & T.*, 59 F.3d 780 (8th Cir. 1995); *Basco v. American Gen. Ins. Co.*, 43 F.3d 964 (5th Cir. 1994); *McKinney v. Waterman S.S. Corp.*, 925 F.2d 1 (1st Cir. 1991); *Claussen v. Mene Grande Oil Co.*, 275 F.2d 108 (3d Cir. 1960).

tween those cases and this case. They claim that, in those cases, the timely filed claims were dismissed, whereas, in this case, the timely filed claims remained pending when the untimely claims were filed. Respondents fundamentally misunderstand the issue. The point of *Basco*, *McKinney*, *Claussen*, and *Mamer* is that the timely filing of a claim in one case does not toll the statute of limitations applied to claims filed in a *different, untimely case*. Whether the claims in the timely case have been dismissed or remain pending when the plaintiff files the untimely claim has no bearing on that issue.[7]

Indeed, *Basco* demonstrates that the pendency of a timely claim does not entitle the plaintiff to file a separate untimely claim. There, at the time that the plaintiff filed his untimely claim against the equipment maker, he had a timely claim pending against that same defendant in another case (the timely claim was later dismissed voluntarily). *See* 43 F.3d at 965. The plaintiff relied on that fact in disputing the defendant's statute-of-limitations defense. *See id.* (plaintiff "maintains that his claim still is not barred because the first claim was not only timely filed *but also pending* when the second claim was filed") (emphasis added). But the Fifth Circuit squarely rejected the plaintiff's contention that, "for purposes of satisfying the statute of limitations for federal maritime torts, the filing of the first suit tolled the statute of limitations as to the filing of the second suit." *Id.* The relevant fact there, as here, was that there were two separate cases, and the timely filing of one suit had no effect on the operation of the statute of limitations in the second, untimely suit.[8]

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[7] Respondents also suggest (at 7) – without explanation – that *Claussen* is different because it involved a claim *in personam* under the Jones Act. But the three-year statute of limitations for maritime personal-injury actions is substantively identical to the three-year statute of limitations for Jones Act claims. *See* Pet. 4-6. Respondents offer no reason for interpreting the two statutes differently.

[8] Although, in *Basco*, the plaintiff eventually voluntarily dismissed his first suit, that does not distinguish that case from this one, where respondents voluntarily abandoned their timely filed claims against

### C. The Ninth Circuit Misinterpreted The Statute

The statute of limitations for maritime personal-injury actions bars respondents' claims. The statute requires claims to be filed within three years of when they accrue. *See* 46 U.S.C. § 30106; 46 U.S.C. app. § 763a (2000); *see also* Br. in Opp. 11. It is undisputed that respondents' claims against the CHLOE Z accrued in 1991 and 1992. *See* Pet. App. 8a; *see also* Br. in Opp. 2. Respondents filed their claims in this case in December 1996, more than three years after their injuries. *See* Pet. App. 9a; *see also* Br. in Opp. 10. Therefore, under the clear language of the statute of limitations, respondents' claims in this case were untimely because they were not filed within three years from the date the claims accrued. *See* Pet. 15.[9]

Instead of defending the Ninth Circuit's decision on the merits, respondents offer an alternative ground for affirmance.[10] They assert (at 12) that, if this Court reverses the Ninth Circuit's failure to enforce the statute of limitations, that court could reinstate the same result on remand by reversing the district court's denial of respondents' motions to consolidate their 1994 cases with this case. Respondents are mistaken. The district court denied their consolidation motions in November 1996. *See* Pet. App. 37a-38a, 44a-45a. Respondents could have raised the denial of those motions in the first appeals in

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the CHLOE Z. The only conceivable relevance of the voluntary dismissal in *Basco* is that it distinguished that case from cases like *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), in which the timely filing of a suit in the wrong forum tolls the statute of limitations. *See* Pet. 16-17. Notably, respondents do not claim that *Burnett* or any similar precedent applies here.

[9] Respondents' protest (at 11-14) that they were not required to cause the CHLOE Z's arrest within three years is beside the point. The statute of limitations bars the claims in this case because respondents failed to *file* those claims within three years of when the claims arose, regardless of when the vessel was arrested.

[10] Considering respondents' failure to defend the judgment on the merits and the fact that no other circuit has adopted the Ninth Circuit's erroneous interpretation of the statute, summary reversal is an appropriate disposition of this case.

this case – which resulted in remands for further factual development on equitable estoppel – but they did not. *See* Pet. 8-9 & n.4 (discussing procedural history). Respondents therefore forfeited any objection to the denial of their motions to consolidate.[11] In any event, the district court properly concluded that, in October 1996, when the consolidation motions were filed, there was nothing to consolidate because respondents had already abandoned their 1994 claims against the CHLOE Z by failing to pursue them in those cases. *See* Pet. App. 39a, 46a.[12]

Respondents also suggest (at 14-16) that their failure to comply with the statute of limitations should be excused because the CHLOE Z's owner had notice of their claims within the limitations period. But, even if that were a basis for declining to apply the statute of limitations (and, absent other circumstances such as those present in *Burnett*, it is not), the notice function of the statute of limitations was not fulfilled in the 1994 suits. When, as here, the defendant is a vessel, providing notice only to the vessel's owner does not suffice. Arrest of the vessel in an action *in rem* is required so that all potential persons with claims on the vessel – such as third-party lienholders – will receive at least constructive notice of the plaintiff's claim against the vessel. *See* Pet. 17-18.[13] As respondents

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[11] *See Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24-25 (per curiam) (issue not raised in one appeal is waived and cannot be raised in later appeal), *amended on denial of reh'g on other grounds*, No. 94-36124, 1996 WL 34361282 (9th Cir. Oct. 28, 1996); *see also* 18B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4478.6 (2d ed. 2002) ("There are powerful reasons to insist that all matters ripe for review at the time an appeal is taken be presented for review or abandoned.").

[12] Respondents' sole authority on this point addresses a different type of case – one in which it was "evident" that this Court's resolution of the question whether state or federal law applied could not affect the result because petitioner was liable under either source of law. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 231 (8th ed. 2002). Here, by contrast, respondents' claim that the result would be the same regardless of this Court's decision is much more speculative.

[13] *See also* Fed. R. Civ. P. Supp. R. C(4) & advisory committee's note (when vessel is not released on bond, "general notice is required in

concede (at 15 n.3), the CHLOE Z was not arrested until the plaintiff mortgagor in this case caused its arrest.[14]

**D. The Issue Is Important**

The Ninth Circuit's decision warrants this Court's review because it destroys congressionally intended uniformity in the time for filing maritime personal-injury claims, forces litigants to defend against stale claims, and encourages plaintiffs to file untimely claims in the Ninth Circuit. *See* Pet. 18-21. Respondents make no serious effort to challenge those conclusions. Although they attempt (at 13) to cabin the Ninth Circuit's holding to the facts of this case, they offer no explanation for why the Ninth Circuit's reasoning would not permit the pursuit of untimely claims in every case in which a plaintiff previously had filed (but failed to pursue) a timely claim.

Additionally, as explained in the *amicus* brief supporting petitioner, if the Ninth Circuit's decision is allowed to stand, it will disrupt the efficient operation of the maritime insurance industry. Int'l Group *et al. Amicus* Br. 5-9. In addition, this case will serve as a powerful incentive to forum shopping, encouraging plaintiffs to file untimely maritime personal-injury claims in the Ninth Circuit. *Id.* at 9-11.

## CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, in light of respondents' failure to defend the decision on the merits, the judgment below should be summarily reversed.

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order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world").

[14] Respondents' attempt (at 15) to draw support from *Claussen* is particularly misguided. The portion of *Claussen* to which they refer (275 F.2d at 110-13) applied the equitable doctrine of laches, which Congress specifically sought to displace when it enacted the statute of limitations for maritime personal-injury actions. *See* H.R. Rep. No. 96-737, at 1-2 (1980); Pet. 4. A court's discussion of laches, therefore, sheds no light on the proper interpretation of the statute at issue here.

Respectfully submitted,

MICHAEL A. BARCOTT
HOLMES WEDDLE
& BARCOTT
999 Third Avenue
Suite 2600
Seattle, Washington 98104
(206) 292-8008

DAVID C. FREDERICK
*Counsel of Record*
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7951

*Counsel for Petitioner*

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